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Supreme Court
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In the Supreme Court of the United States

OCTOBER TERM 1976

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

OTHA LEE MOBBS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, OF THE STATE OF CALIFORNIA

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THE PEOPLE OF THE STATE OF CALIFORNIA,

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OTHA LEE MOBBS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, OF THE STATE OF CALIFORNIA

The People of the State of California respectfully petition that a writ of certiorari be issued to review the judgment of the Court of Appeal, Second Appellate District, State of California, entered in this case on March 26, 1976.

OPINIONS BELOW

The opinion of the Court of Appeal of the Second Appellate District, State of California, filed on March 26, 1976, is printed as Appendix A hereto.

The opinion on denial of rehearing of the same court, filed on April 21, 1976, is printed as Appendix B hereto.

A notification by the California Supreme Court of denial of hearing in this case, filed May 26, 1976, is printed as Appendix C hereto.

The order of the Court of Appeal directing that issuance of the remittitur herein be stayed pending application for the within writ of certiorari, filed June 25, 1976, is printed as Appendix D hereto.

JURISDICTION

The Court of Appeal, Second Appellate District, of the State of California entered judgment in this case on March 26, 1976. A timely petition for rehearing was filed, and on April 21, 1976, the Court of Appeal issued its opinion on denial of rehearing. A timely petition for hearing was filed with the Supreme Court of the State of California, and that court on May 26, 1976, entered its order denying the petition for hearing. Issuance of remittitur in the matter has been stayed by order of the Court of Appeal filed June 25, 1976.

The jurisdiction of this Court is invoked under Title 28 U.S.C. section 1257(3).

QUESTIONS PRESENTED

I

Whether clarifying questions may be asked of a suspect after he has made a conditional invocation of his right to remain silent?

II

Whether, after a suspect's condition on his waiver is met, interrogation may resume?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision which the present case involves is the Fifth Amendment to the United States Constitution. The Fifth Amendment provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when an actual service in time of war or public danger; nor shall a person be subject for the same offense or twice be put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, or that due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

A. Lower State Court Proceedings

By information filed August 23, 1974, the District Attorney of Los Angeles County accused respondent and two others of murder in violation of Penal Code section 187, including a use allegation, and in Count Two accused respondent and two others of attempted robbery in violation of Penal Code sections 664 and 211, again with a use allegation. (C.T. 1-2.) 1/

1/ C.T. refers to the Clerk's Transcript of proceedings in this matter.

That day respondent was arraigned on the information, entered pleas of not guilty to the charges, and denied the use allegation. (C.T. 3.)

Respondent's motion to sever his trial was granted on October 8, 1974. (C.T. 7.) The matter was called for trial on February 26, 1975. (C.T. 11.)

On February 28, 1975, respondent's motion outside the presence of the jury to exclude certain statements of respondent was argued and denied. (C.T. 13.) On March 3, 1975, trial commenced. (C.T. 14.)

On March 14, 1975, the jury returned verdicts finding respondent guilty of murder, fixing the degree thereof as second degree, and finding it to be true that respondent used a handgun at the time of commission of the offense. (C.T. 96.) On April 25, 1975, respondent's motion for new trial was denied, probation was denied, and respondent was sentenced to state prison for the term prescribed by law. (C.T. 99.) Timely notice of appeal was filed. (C.T. 100.)

B. State Appellate Proceedings

The matter was argued on March 17, 1976, before Division Three of the Court of Appeal, Second Appellate District, State of California. The opinion of that court reversing the case was filed on March 26, 1976. (App. A.)

A petition for rehearing was filed, and on April 21, 1976, the Court of Appeal filed its opinion on denial of rehearing. Justice Allport, who had concurred in the original opinion, dissented from the denial of rehearing. (App. B.)

A petition for hearing was filed in the California Supreme Court, and on May 26, 1976, that court entered its order denying a hearing in the matter. (App. C.)

By order filed June 25, 1976, the Court of Appeal directed issuance of the remittitur in this case be stayed pending filing of the within application for writ of certiorari. (App. D.)

FACTUAL STATEMENT

On June 8, 1974, Donald Darrel Bays lived in Space 4 at a trailer park on Normandie Avenue in Los Angeles. The manager of the park, Helen Godwin, saw Mr. Bays about a quarter to twelve in the morning of that day. (R.T. 279, 282.) 2/

Shortly after noon, Mrs. Godwin and Hermann Buettner, another resident of the trailer park, saw two black girls enter the park, go to Darrel Bays' trailer, and enter. Mrs. Godwin's attention was directed at the girls because they were strangers and because they were blacks in a Caucasian area. (R.T. 281-282, 313.)

Three or four minutes later two black men came into the trailer park, went to Darrel Bays' trailer, and entered it. Both Mrs. Godwin and Mr. Buettner identified respondent as one of the men. (R.T. 284-285, 314-315.) Shortly after Mobbs, and his companion entered Darrel Bays' trailer, the two girls came out quickly and left the park. (R.T. 285, 316.)

After the girls left the park, Mr. Buettner heard voices in Darrel Bays' trailer, and then heard a shot. (R.T. 316.) Mr. Buettner saw respondent and his companion, Reece Sowells, leave the trailer. Reece Sowells was putting a handgun away in his waistband. Mrs. Godwin also saw the two men leaving the park, and noticed that one of them broke into a run. (R.T. 286-287, 318.)

2/ R.T. refers to the Reporter's Transcript of proceedings in this matter.

Mr. Buettner went and got Mrs. Godwin and the two of them went to trailer number four. Mr. Buettner went inside, and saw Darrel Bays lying on his stomach in the bedroom. Mr. Bays' hands were tied behind his back and his feet were tied together with nylon stockings or panty hose. Mr. Buettner shook Mr. Bays' feet to see if he was still alive, and upon looking closer observed a hole in the decedent's shirt in the area of the neck. Mr. Buettner then left the trailer and called the authorities. (R.T. 289-290, 319-320, 323.)

Robert Kummelehne, a Los Angeles County fireman paramedic, arrived on the scene and observed Mr. Bays face down on the bed tied hand and foot. Bays was unconscious and not breathing, although he had a faint pulse. Bays' nose and mouth were submerged in a pool of blood, which prevented his breathing. Efforts to revive Bays, however, failed. (R.T. 295-297, 301-303.)

Darrel Bays died from a gunshot wound which severed the cervical spinal cord. (R.T. 254.) In the opinion of the medical examiner the muzzle of the gun was pressed up against the back of the shirt collar when the gun was fired. (R.T. 261.)

It was stipulated at trial that Pamela Williams was telephoned at Mobb's house and was solicited by the decedent, Darrel Bays, for an act of prostitution to take place at the trailer. Pamela Williams and another girl, Desiree Charbonnet, went to the trailer together. (R.T. 429.)

Respondent was arrested on June 22, 1974, by Sergeant Michael Nelson and Deputy Ronald Ablott of the Los Angeles County Sheriff's Office. (R.T. 345-347.) While enroute to the Hall of Justice, Sergeant Nelson warned respondent of his constitutional rights, and Mobbs indicated he understood them and waived them. (R.T. 348.)

In the police vehicle respondent stated on June 8 he had received a telephone call at his home from Darrel Bays, and Bays had asked for "Peaches," or Pamela Williams, Mobbs' girlfriend. After the phone call Mobbs, Reece Sowells, Pam Williams, and Desiree Charbonnet went to the trailer park. (R.T. 349.)

A short while after the girls went into the trailer, respondent and Reece had entered the trailer and told the girls to leave. Respondent had with him some nylon stockings he had obtained from the trash and had a gun with him he had found near his home. Mobb's intention at the time was to scare Bays to prevent him from calling asking for Pam anymore. Mobbs admitted pointing a gun at Bays, and telling him to lie on his stomach. (R.T. 350.)

Respondent gave the gun to Reece Sowells to hold while Mobbs tied Bays up. After tying Bays up, respondent placed the muzzel of the gun in the back of the victim's head. Bays continued "running off at the mouth," and according to respondent, Reece Sowells slapped Bays, causing Bays to jerk his head back, at which time the gun discharged. (R.T. 350.)

Mobbs further related he and Reece then left the location, with Reece panicking and running, while respondent walked out slowly. They returned to the car, picked up the girls, and drove away. Mobbs claimed to have thrown the gun out of the car during this trip. (R.T. 350-351.)

At the Hall of Justice Mobbs was again given a complete advisement of his *Miranda* rights. He indicated, however, he did not wish to discuss the case "right now." It was determined that respondent wished to telephone his home before continuing to talk about the matter. (R.T. 64-65.) The interview then ceased to permit Mobbs to call his home. (R.T. 34.)

Respondent telephoned his home. Officer Nelson, seated to the right of Mobbs and in his view, listened to this

conversation on an extension. Talking to his brother, respondent said: "What should I do?" Mobbs' brother replied: "You done did it." Mobbs stated: "It was an accident. I did it." Respondent's brother asked: "Did you kill him?" Mobbs replied: "The way it happened was an accident." (R.T. 431-433.)

Following the telephone conversation with his brother, respondent was again advised of his rights, and stated he was now willing to talk. (R.T. 39.) Mobbs then made a tape recorded statement. This statement was essentially identical to the narration of events he had recounted in the police vehicle on the way to the Hall of Justice. (R.T. 363-365.) This tape recorded statement was played for the jury following testimony as to Mobbs' statement in the automobile. (R.T. 355.)

SUMMARY OF ARGUMENT

The California Court of Appeals, relying on *Miranda v. Arizona*, 384 U.S. 436 (1966), as interpreted by the California Supreme Court, ruled that a police officer's attempt to clarify statements by a defendant concerning his willingness to talk was improper. Further, the court, again relying on an interpretation of *Miranda v. Arizona*, held it was improper to interrogate the defendant after his condition upon interrogation had been fulfilled.

Petitioner submits these rulings do nothing to further the purpose sought to be achieved by *Miranda*. The *Miranda* rule is intended to insure an accused would be fully and effectively advised of his rights in order to counterbalance the pressures of custodial interrogation. Questioning which seeks to clarify an assertion of right, however, has nothing whatsoever to do with self-incrimination. Furthermore, an interpretation of *Miranda* which bars all further contact with a defendant, even when that is not what is desired by the defendant, is an absurdity unsupported by *Miranda* or any legitimate purpose sought to be served in the protection of a defendant's rights.

Petitioner in this case contends no more than (1) questions seeking to clarify an ambiguous assertion of right are proper and (2) where a conditional waiver is made by a defendant, law enforcement officers may properly resume interrogation when the condition is fulfilled, particularly where, as here, the *Miranda* warnings are again administered and a fresh waiver is obtained from the defendant.

The holding of the California Court of Appeals elevates the interrogation process to a level of legal complexity matched, if at all, only by the Rule against Perpetuities. Police officers, engaged in the investigation of the crime, should not be trapped by linguistic legerdemain. Respondent in this case, after being advised of his rights, wished to make a telephone call before he talked. He made the telephone call. He was again advised of his rights. He then talked. Nothing in the least reprehensible appears in any of the police contacts with respondent. Reversal of the decision below would in no manner diminish the rights accorded an accused, but would rather support reason and the understanding of the parties below as well as the efficient investigation of crime.

ARGUMENT

I

CLARIFYING QUESTIONS MAY BE ASKED OF THE SUSPECT AFTER HE HAS MADE AN AMBIGUOUS INDICATION OF HIS RIGHT TO REMAIN SILENT

The central issue in this proceeding revolves around the constitutional implications of a brief exchange between respondent and a sheriff's deputy following their arrival at the Hall of Justice. As noted above, respondent had related to the officers while in the police vehicle a somewhat damaging statement, although claiming the shooting to have been accidental. At the Hall of Justice respondent was read a complete statement of his rights. The following then occurred:

"Q. Do you understand each of the rights explained to you?

"A. Yes.

"Q. Do you want to talk about this case or not?

"A. Not right now.

"Q. Well now, a few moments ago when we were in the car and when we were talking here, you were previously advised of your rights and you stated that you did want to talk about it. Have you changed your mind or do you want to get this off your chest?

"A. Changed my mind.

"A. Pardon me?

"A. Changed my mind.

"Q. Can you tell us why?

"A. 'Cause I want to talk to two people.

"Q. Who do you want to talk to?

"A. My mother and Pam [Williams]." (Opinion, pp. 5-6, fn. 2.)

The opinion and the opinion on denial of rehearing of the Court of Appeals in this matter is fundamentally erroneous. In the opinion on denial of rehearing, the Court of Appeals stated:

> ". . . The *Miranda* violation occurred in taking the taped confession of appellant after he had twice informed his interrogators that he had changed his mind about talking to them. Further inquiries by them should have ceased at that point." (Opinion on denial of rehearing, p. 1.)

The problem here is that confusion between the asking of clarifying questions and *interrogation*, that is, *a process of questioning designed to elicit incriminating statements.* Respondent had given the officers a statement in the police vehicle. When asked if he wished to talk about the case with a tape recorder present, he replied "Not right now." The officers, understandably confused, sought to clarify this. The ambiguity of the "not right now" statement was clarified when respondent stated that he first wished to talk to two people.

None of this conversation has anything whatsoever to do with interrogation, which would indeed be forbidden after the invocation of the right to remain silent, however temporarily. An assertion of *Miranda* rights does not, however, mean a complete prohibition on any verbal transaction whatsoever between police and a defendant. Rather, *custodial interrogation* may not be carried out in violation of such an assertion of right. Nothing of the sort appears in the transaction quoted above.

Because the Court of Appeals below confused the distinction between questioning unrelated to criminal activity and interrogation designed to elicit incriminating statements, there was no violation of *Miranda* in the officers' attempts to determine whether and to what extent appellant was invoking his right to remain silent. *United States v. Menichino*, 497 F.2d 935, 941 (5th Cir. 1974).

II

AFTER A SUSPECT'S CONDITIONAL WAIVER IS SATISFIED, INTERROGATION MAY PROPERLY RESUME

Further constitutional confusion is evidenced by the statement in the opinion of the Court of Appeals that ". . . Because the taped confession which followed the coloquy we have just analyzed was obtained after [Mobbs] communicated his desire to remain silent, it was error to admit the recording in evidence." (Opinion, p. 7.) Also, in the opinion on denial of the rehearing, the Court of Appeals states "Further inquiries by [the officers] should have ceased at that point." (Opinion on denial of rehearing, p. 1.)

In other words, the holding of the Court of Appeals is that after Mobbs communicated to the officers his desire to remain silent they could not interrogate him. The People agree completely with this position, adding only one small caveat: For what period of time? Does an invocation of right such as the present one forbid any contact with persons such as respondent by police authorities at any time on any date in connection with any matter? Or is an invocation of right to be respected according to its terms? The latter, of course, is the correct interpretation of *Miranda*.

The *Miranda* decision itself made this clear. Invocation of the right to an attorney, for example, simply prevents the police from pursuing further inquiries until the defendant ". . . has consulted with an attorney and thereafter consents to be questioned." *Miranda v. Arizona*, 384 U.S. 436 (1966). In other words, an invocation of right must be respected according to its terms. A literalist and extreme interpretation of *Miranda* is not required by the terms of that decision.

A recent opinion by this Court underlines the validity of this proposition. *Michigan v. Mosley*, 423 U.S. 96 (1975), is of great assistance in elucidating *Miranda*. In that case the defendant was questioned by a police officer with respect to a robbery, and indicated he did not wish to discuss the matter. Interrogation thereupon ceased. Shortly thereafter another detective, from the homicide detail, again gave the defendant his *Miranda* rights, following which appellant discussed his participation in a murder. The question before this Court was the interpretation of the passage in the *Miranda* decision to the effect interrogation must cease when the person in custody indicates he wishes to remain silent. 423 U.S. 101-103.

This Court noted that the *Miranda* decision itself would permit resumed questioning after a suspect had obtained an attorney if the attorney was then present. The Court observed, however, this procedure was not decisive of the question before them, as Mosley did not request an attorney. 423 U.S. 101, n. 7. This Court pointed out a literalist interpretation of *Miranda* would prohibit ever questioning a person who had invoked his right to silence at any time or place or upon any subject. After characterizing this as an absurd and unintended result, the Court noted ". . . the vast majority of federal and state courts presented with the issue have concluded that the *Miranda* opinion does not create a *per se* proscription of any further interrogation once the person being questioned has indicated a desire to remain silent. [Citations.]" 423 U.S. 103, n. 9.

This Court determined in the circumstances of the *Mosley* case the defendant's right to cut off questioning had been fully respected. As the Court pointed out,

> "This is not a case, therefore, where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by

> persisting in repeated efforts to wear down his resistance and make him change his mind. In contrast to such practices, the police here immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation." 423 U.S. 105-106.

In conclusion, the Court found the provision of warnings at the outset of interrogation, the suspension of questioning in accordance with the defendant's wishes, and the lack of any overbearing conduct combined to support admission of the incriminating statement obtained. 423 U.S. 106-107.

The central teaching to be derived from *Mosley* is that, in determining whether an individual who has once invoked his right to silence may thereafter be questioned, the entire circumstances of the affair should be looked at. Tested by these principles, respondent Mobbs' provisional invocation of his right to remain silent, that is, conditioning it upon the making of a telephone call, was fully respected. Interrogation ceased at that point, and Mobbs was again reminded of his rights following completion of the telephone call, indicating he then wished to discuss the matter. (R.T. 34, 39.) On this record there is no reason to even suspect a *Miranda* violation as that decision is construed by this Court.

The present matter falls squarely within the legal principles enunciated above. The practicality of the application of these principles to this matter is perhaps best illustrated by way of an example: After being advised of his rights and indicating he understands them, a defendant is asked whether he wishes

to discuss the matter. He replies "Not until I get a pack of cigarettes." The police cease interrogation, procure a pack of cigarettes, and furnish them to the suspect. Questioning then resumes, preceded by a reminder of the suspect's rights. Does such a procedure violate *Miranda?* The answer, of course, must be no.

That is precisely the situation in the present case. The discussion between respondent and the officers set forth in footnote two of the court's opinion (opinion p. 5) may be summarized as follows: Mobbs was willing to speak to the officers, but only after he communicated with his family. This was in fact the way the conversation was interpreted by one of the participants. (R.T. 89.) The validity of this interpretation is supported by the fact Mobbs, upon having his condition precedent to speaking with the officers fulfilled, proceeded to make a statement without coercion or harrassment of any kind being practiced upon him, and after again having been informed of his rights.

The entire matter was the subject of lengthy and extensive hearings in the trial court. Following these hearings, the trial court found Mobbs was properly advised of his constitutional rights, properly waived them, freely and voluntarily made the statements in question, and was not subjected to any improper police conduct. (R.T. 203.) The trial court specifically found Mobbs' taped statement was a product of his own psychological makeup and contributing factors other than police interrogation. One of these contributing factors was the fulfillment of "Mobbs'" condition on his speaking with the officers, that is, the making of a phone call. Specifically, the court found his taped statement was properly admissible because (1) there had been an earlier statement to the same effect, (2) Mobbs was aware a participant in the proceedings had placed him at the scene of the crime, (3) having previously incriminated himself he was disposed to reiterate his version of events, (4) Mobbs' conversation with his brother

contributed to his determination to give a statement to Officer Nelson, (5) his knowledge of his conversation with his brother had been overheard by Officer Nelson further contributed to his resolve to discuss the matter, (6) the manner of questioning was absolutely non-coercive, (7) there was no request to see an attorney, and (8) the testimony of all the witnesses, all the documents, and the entire record before court supported this conclusion. (R.T. 203-206.)

Petitioner has seldom seen a record in which the trial judge displayed as clear an awareness of the issues and the matters necessary to resolve them as in the present case. By no stretch of the imagination is this a situation in which the burden of proof on the People to show a waiver of constitutional rights was not met. Compare *People v. Parker,* 45 Cal.App.3d 24, 29 (1975).

The present matter is thus distinguishable from *People v. Superior Court (Zolnay),* 15 Cal.3d 729, 737 (1975), where the California Supreme Court found a confession after the assertion of the privilege was *elicited* by police questioning. In the present case, the trial judge found Mobbs'statement after fulfillment of his condition precedent to speaking was motivated by factors other than the officers' questioning. (R.T. 203-206.) Because the holding of the Court of Appeals, contrary to the reasoning of the trial court, misapplies the *Miranda* principles as enunciated by this Court, the opinion of the Court of Appeals was in error, and no constitutional violation whatsoever occurred in this case.

CONCLUSION

Wherefore, petitioner concludes that this Court should grant certiorari to resolve these questions of overwhelming importance to the bench, the bar, law enforcement, and the public as a whole.

Respectfully submitted,

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APPENDIX A

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. OTHA LEE MOBBS, Defendant and Appellant.	2D CRIM. NO. 27437 Sup. Ct. No. A-607928

APPEAL from a Judgment of the Superior Court of Los Angeles County. Carlos E. Velarde, Judge. Reversed.

Block and Cohen and Seymour I. Cohen, under appointment by the Court of Appeal, for Defendant and Appellant.

Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, Daniel J. Kremer, Assistant Attorney General, A. Wells Petersen and Karl J. Phaler, Deputy Attorneys General, for Plaintiff and Respondent.

Otha L. Mobbs appeals from a judgment of conviction of second degree murder (Pen. Code, §§ 187, 189) following a jury trial. The appeal lies. (Pen. Code, § 1237, subd. (1).)

Appellant urges numerous grounds for the reversal of his conviction. We have concluded, however, that the single issue of the admissibility in evidence of a tape recorded

interrogation of appellant is dispositive of this appeal. Thus we do not reach appellant's remaining contentions. Because the use of the tape recording at trial was a prejudicial abridgement of appellant's federal and state constitutional protection against self-incrimination, we will reverse his conviction.

STATEMENT OF FACTS [1/]

On June 8, 1974, Donald Bays called appellant's home and told appellant he wished to speak to appellant's girl friend, Pam Williams. Williams in the past had performed acts of prostitution with, and received payment from, Bays. Appellant was aware of but tried to discourage his girl friend's conduct. As a result of the phone call, Williams agreed to go to Bays' residence to perform an act of prostitution. Appellant, Williams and two of their acquaintances, Reece Sowells and Desiree Charbonnet, drove in Sowells' car to Bays' trailer park home.

Sowells parked the car a short distance from the trailer park, and the girls entered Bays' trailer. Moments later, the two men left the car and also went into the trailer. Once inside, they told the girls to get out. Appellant brandished a handgun, ordered Bays to lie on the bed, and told Sowells to tie the victim's hands and feet with nylon stockings appellant had brought with him for that purpose.

Bays at one point protested and uttered profanities at his two attackers. Sowells slapped him, his head jerked back against the cocked gun which appellant had trained upon him, and the gun discharged. Bays died of the single wound. Appellant and Sowells ran from the trailer immediately after the incident.

1/ We construe all conflicting evidence in the light most favorable to the People as the prevailing party below. (See *People v. Vann*, 12 Cal.3d 220, 225.)

Appellant called Sowells as a hostile witness in his defense. Sowells testified that Bays said nothing, that appellant had struck the victim, and that at the time the gun discharged, both Sowells and appellant "had ahold" of it. Appellant's trial counsel impeached this testimony by introducing a prior statement of Sowells that he alone was holding the gun when it "accidentally" went off.

Appellant testified in his own behalf that Sowells brought the gun into the trailer, that appellant discovered Bays with his arm around Pam Williams and Bays' trousers unzipped, that appellant tied the victim up with stockings found on the bed while Sowells held the gun, and that when Bays insulted him appellant struck Bays causing his head to hit the gun.

DISCUSSION

I. The Admissibility of Appellant's Oral and Taped Confessions

According to the testimony of deputy sheriffs, appellant twice gave detailed answers to their questions about Bays' death. The first confession occurred after appellant's arrest while he was being driven to the Hall of Justice. The second was tape recorded there. Appellant contends that on both occasions, statements were obtained from him in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694], and *People v. Fioritto*, 68 Cal.2d 714.

There is substantial evidence to support the trial court's conclusion as to the legality of the patrol car confession. Both deputies testified that they advised appellant of his constitutional rights and obtained valid waivers of those rights before appellant made any statements. The trial court's finding on this issue will not be disturbed on appeal unless it is clearly erroneous. (See *People v. Rodriguez*, 256 Cal.App.2d 663, 668-670.)

The admission in evidence of the second, recorded confession, however, was erroneous. To assist in explaining our conclusion, we reproduce below a transcript of the relevant portions of the recording. 2/ Appellant's first indication that he no longer wanted to talk to the deputies ("Not right now") was somewhat ambiguous and conditional. Appellant's

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2/ [Preliminarily, one deputy asked appellant his name and read to him a complete statement of the rights accorded him under the *Miranda* decision.]

"Q. Do you understand each of the rights explained to you?

"A. Yes.

"Q. Do you want to talk about this case or not?

"A. Not right now.

"Q. Well now, a few moments ago when wer were in the car and when we were talking here, you were previously advised of your rights and you stated that you did want to talk about it. Have you changed your mind or do you want to get this off your chest?

"A. Changed my mind.

"Q. Pardon me?

"A. Changed my mind.

"Q. Can you tell us why?

"A. 'Cause I want to talk to two people.

"Q. Who do you want to talk to?

"A. My mother and Pam [Williams]."

[Appellant then telephoned his home and spoke with his younger brother. Evidence of this incriminating conversation, which was overheard by deputies, was not introduced at trial. Following the call, the deputy resumed the interrogation and obtained appellant's confession.]

interrogators could properly seek clarification of his confusing assertion of constitutional rights. 3/ (See *People v. Turnage*, 45 Cal.App.3d 201. 211, and *People v. Brashier*, 271 Cal.App.2d 298, 302.)

Despite this opening ambiguity, appellant's response ("Changed my mind") to the deputy's next question was a reasonably clear indication, stated twice, that he did not wish to speak further with the officers. The fact that shortly before he may have been willing to talk is irrelevant. As our Supreme Court has recently stated, the mandate of *Miranda* regarding the invocation of constitutional rights is "broad" and may be indicated by a suspect "*in any manner and at any state of the process.*" The decision need not be made with "unmistakable clarity." (Emphasis original.) (*People v. Superior Court (Zolnay)*, 15 Cal.3d 729, 735-736, in part quoting *Miranda v. Arizona*, *supra*, 384 U.S. at 444-445 [16 L.Ed.2d at 707].)

We fail to see how the deputies interrogating appellant could have understood appellant's statement of change of mind as anything other than a decision thereafter to remain silent.

3/ The deputy's next question ("Have you changed your mind or do you want to get this off your chest?"), however, failed to seek the appropriate clarification. (Cf. *People v. Fisher*, 49 Cal.App.3d 174, 179.) Instead it was couched in terms of a strong moral exhortation. While this type of remark may not render a subsequent confession involuntary (see *People v. Hill*, 66 Cal.2d 536, 549), we think it is clearly contrary to the intention stated in *Miranda v. Arizona, supra*, that a suspect must be informed of his constitutional rights in "clear and unequivocal terms." (384 U.S. at 468 [16 L.Ed.2d at 720]; cf. *People. v. Russell*, 259 Cal.App.2d 637, 645-646.)

Indeed, the deputy's next question to appellant ("Why?") demonstrates that the interrogator did comprehend appellant's meaning. Because the taped confession which followed the colloquy we have just analyzed was obtained after appellant communicated his desire to remain silent, it was error to admit the recording in evidence. (See *People v. Burton*, 6 Cal.3d 375, 384.)

II. Was the Erroneous Admission of the Tape Recording Prejudicial?

The use at trial of an improperly obtained confession is usually reversible error per se. (*People v. Fioritto, supra*, 68 Cal.2d at 720.) This may not be the result, however, if the defendant has made multiple confessions, at least one of which was properly admitted in evidence. (See *People v. Jacobson*, 63 Cal.2d 319, 330-331.) In order to affirm a conviction based upon multiple confessions, an appellate court must be satisfied beyond a reasonable doubt that no result more favorable to appellant would have occurred had the illegal confession(s) not been admitted in evidence. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710].) Such harmless error is most likely when (1) the proper confession preceded the improper one in time; (2) the improper confession provided detail not significantly different from the proper one; and (3) no undue emphasis was placed at trial upon the improper confession. (See *People v. Powell*, 67 Cal.2d 32, 53-54.) Obviously, the first condition was met in the instant case. It is also true that the deputy sheriff who arrested and twice interrogated appellant testified that the two confessions were "substantially identical." 4/

4/ Indeed, the deputy's recounting of the patrol car confession bears an uncanny resemblance in chronology and detail to the contents of the taped confession. While we do not suggest

(Cont'd.)

It is the third criterion which we believe makes the introduction of the illegal confession prejudicial to appellant. We are not convinced beyond a reasonable doubt that no special emphasis was placed upon the taped confession. In reaching this conclusion, we do no more than observe the emphasis accorded the taped confession by the prosecutor and the jury. (See *People v. Cruz*, 61 Cal.2d 861, 868.) The prosecutor in his cross-examination of appellant relied repeatedly on the contents of the taped transcript for impeachment purposes. 5/ (Cf. *People v. Powell, supra*, 67 Cal.2d at 55.) In his closing argument

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that the first interrogation was imaginary, we do note that when appellant told the deputy on tape that he had changed his mind and did not wish to talk, the deputy did not remind appellant that he had already confessed -- only that appellant had earlier expressed a willingness to talk. We also should point out that the existence of the first confession was not even revealed by the People until after the jury was impaneled and the taped confession's admissibility was under challenge. Appellant himself denied making any statements in the patrol car.

As long as the recorded confession was before it, the jury had no reason to consider seriously the existence of the first confession. Upon retrial, this issue will be squarely faced.

5/ We offer as examples two extended excerpts.

"Q. All right. When you were talking to the police officers, you told them that you carried the nylons in; is that right?

"A. Yes.

"Q. You didn't tell them Reece carried the nylons in, right, because you were trying to protect him?

"A. Yes.

(Cont'd.)

to the jury, the prosecutor referred on several occasions to "appellant's confession," apparently considering the two

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"Q. And you told them that the gun was in your hand when it was fired; is that right?

"A. Yes.

"Q. And the reason you did that was because you were trying to protect him?

"A. Yes.

"Q. But then on page 94 of your statement at line 22 -- strike that -- at line 20 and following to the end of the page were you asked the following questions and did you give the following answers:

'Q. Well, I mean you went down there. How did you get there?

'A. With Reece.

'Q. With Reece? Now, is that man's name Maurice or Reece?

'A. I call him Reece.

'Q. Have you heard him called anything else?

'A. Maurice.'

You were trying to protect him by giving the police his name?

"A. They didn't have his whole name.

"Q. Could you turn to page 97, lines 15 through 18. Was the following question asked of you and did you give the following answer:

'Q. Then what happened?

'A. I let Maurice hold the gun. Then I tied him up.

'Q. Maurice held the gun while you tied him up?

'A. Uh-huh.'

Were you trying to protect Maurice or Reece by telling the police that Reece held the gun?

(Con't.)

inseparable. (Cf. *People v. Spencer*, 66 Cal.2d 158, 164 (where multiple confessions cannot be separated, defendant will be

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"A. Yes, because at the time they only had Reece or Maurice. They didn't have his last name.

"Q. They found you, didn't they?

"A. They still didn't have him.

"Q. Page 98, line 3 through line 5:

'Q. Had you taken it back from Maurice then, the gun?

'A. Yes. So he was still running off at the mouth. So Maurice slapped him outside the head and when he slapped him outside the head, the gun, I guess, I guess it hit the gun. The gun went off.'

That was the question you were asked and the answer you gave?

"A. I think so.

"Q. You told the police that the gun was caused to fire by something that Maurice did; is that correct?

"Q. Yes."

"Q. Now, when you talked to the police officers, was the following question asked and did you give the following answer?

"Mr. Thomas: What is your reference?

"Mr. Levitin: Page 98, counsel, lines 16 and 17.

'Q. Uh-huh, then it is your feeling that you didn't really mean to shoot him?

'A. No, my intentions is to scare him.'

"Q. Is that your answer to the police officers?

"A. Yes.

"Q. Is that what you wanted to do?

(Cont'd.)

considered to have made only one confession).) Further examination of his remarks, however, reveals that he was speaking

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"A. I don't know what I wanted to do.

"Q. Well, when you told the police officers that, were you lying to them?

"A. Yes.

"Q. You wanted to hurt that man, didn't you?

"A. I don't know.

"Q. Didn't you want to get even?

"A. I don't know.

"Q. You told the police officers that the gun was in your hand when the shot was fired, didn't you?

"A. Yes.

"Q. Now, on page 107 of the transcript beginning at line 5 the following question was asked, my question to you were the following questions asked you and the following answers given by you? Question by Sergeant Nelson.

'Q. Well, theis concludes the interview except that I want to ask you just this one thing. Has all this been freely and voluntarily given by you?

'A. Yes.

'Q. Nobody has used any brutality or anything like that to you; is that right?

'A. Yes.

'Q. So, in other word[s], this is all -- getting it out of your own chest; is that right?

'A. Yes.

'Q. Okay. Speak up just a little bit.

'A. Yes.

'Q. Have you been treated fairly and so on since you have been here?

'A. Yes.'

(Cont'd.)

particularly of the taped statement. 6/

Now, when you were asked those questions and you give those answers, is that what happened? Does that fairly depict what happened? You were asked those questions and you gave those answers?

"A. Yes.

"Q. You didn't say at that time I am trying to protect Reece, and I am trying to protect Pamela Williams, and I am taking this whole thing on my chest because I want to proctect [sic] everybody. You didn't want to say that?

"A. No, because if I was protecting them like I was, why should I have brought it up?

"Q. You didn't tell the police that you went over there by yourself and did everything all by yourself?

"A. No, they didn't have no names and addresses et cetera.

"Q. They had Pamela Wiliiams, didn't they?

"A. That is all they had.

"Q. You didn't say I went there by myself?

"A. No, I didn't.

"MR. LEVITIN: I have no further questions."

6/ We have reproduced below three of the most emphatic references to the taped confession.

1. "I think one of the most important pieces of evidence in this case . . is the evidence which is produced as a result of talking to the defendant Mr. Otha Mobbs. Now on June the 22nd of 1974, Mr. Otha Mobbs spoke on tape and before that in the car, police car, to Sergeant Nelson. Sergeant Nelson testified that . . . when [appellant] got to that location he followed, those were his words, they appear on the tape, he followed Pamela Williams to see where she was going."

(Cont'd.)

The jury also placed considerably greater emphasis on the taped statement than on the fleeting testimony of the deputy. We need not speculate on this point because the record reveals that during the jury's deliberations, it requested and received permission to play the tape. There were no requests to review the deputy's testimony. The jury's preference for the tape is hardly surprising. "[E]vidence, from the lips of the third persons, is trifling when compared with the impact of hearing the defendant's own voice . . . . The impact of the tape [recording] cannot be calculated." (*People v. Jacobson, supra,* 63 Cal.2d at 342 (Peters, J., dissenting).)

While Justice Peters' viewpoint did not prevail in *People v. Jacobson,* that was a pre-*Chapman* decision which cited both *People v. Watson,* 46 Cal.2d 818, 836 (error more likely than not contributed to conviction) and *Fahy v. Connecticut* (1963) 375 U.S. 85, 86-87 [11 L.Ed.2d 171, 173] ("reasonable possibility" that error might have contributed to the conviction). More importantly, the defendant in *Jacobson* provided the prosecution with no less than eight valid confessions. (See also *People v. Neustice,* 24 Cal.App.3d 178, 183-186, 188.) In the instant case, the jury was given only two confessions. The People called no eyewitnesses to the events inside the

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2. "Well, you are going to have an opportunity to have that confession, the tape recorded version of that confession in chambers, and you will have an opportunity to listen to it. . . . How can anybody say that that confession is unreliable? That confession is the crux of this case."

3. "The only explanation of what they were doing there, the only explanation, that is the one that is found in his, the defendant's confession. That explains it."

trailer. We think it accurate to state that the taped confession, by its form and use at appellant's trial, received substantially greater emphasis than the oral confession. 7/ Thus its admission in evidence was prejudicial and requires reversal of appellant's conviction. (Cf. *People v. Disbrow,* 16 Cal.3d 101, 116.)

DISPOSITION

The judgment is reversed.

COBEY, Acting P.J.

We concur:

ALLPORT, J.

POTTER, J.

7/ In *People v. Valencia,* 267 Cal.App.2d 620, this court determined that the erroneous admission of an illegal taped confession was harmless because there were *two* proper confessions placed before the jury and because the *independent evidence* of the defendant's guilt was "overwhelming." (*Id.* at 627-628.) The *Valencia* decision gave no consideration to the special evidentiary impact of a taped confession as opposed to a single confession presented through hearsay testimony. This distinction makes the taped confession more than merely cumulative to a single oral confession. As our Supreme Court said in *People v. Quicke,* 71 Cal.2d 502, at 516, in order for the harmless error rule to apply in multiple confession cases, "[t]he properly admitted confession must nullify any ancillary effect of the improperly admitted confession." While the present case is admittedly a close one, we cannot say beyond a reasonable doubt that such nullification occurred.

APPENDIX B

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. OTHA LEE MOBBS, Defendant and Appellant.	2D Crim. No. 27437

OPINION ON DENIAL OF REHEARING

We are denying the People's petition for rehearing for the following reasons. The *Miranda* violation occurred in taking the taped confession of appellant after he had twice informed his interrogators that he had changed his mind about talking to them. Further inquiries by them should have ceased at that point. (See *People v. Fioritto*, *supra*, 68 Cal.2d 714, 719.) The fact that immediately thereafter appellant made what the People have construed as a conditional offer to talk is irrelevant.

Neither appellant's testimony nor that of his confederate at trial may be considered by us in determining whether we have a reasonable doubt as to whether appellant would have been convicted of the same crime without the improperly admitted taped confession. We say this because the People have not

shown that the testimony of these individuals was not impelled by the People's prior improper introduction of appellant's taped confession. (See *People v. Spencer*, *supra*, 66 Cal.2d 158, 168.)

Furthermore, in view of the special reliance upon the improperly admitted taped confession displayed by the prosecutor and the jury, as noted at some length in our original opinion, we are unable to say that we are convinced beyond a reasonable doubt that appellant would have been convicted on the basis essentially of his properly admitted prior oral confession.

The People's petition for rehearing is denied.

COBEY, Acting P.J.

I concur:

POTTER, J.

I dissent. I would grant rehearing.

ALLPORT, J.

APPENDIX C

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HEARING DENIED

In re: 2 Crim. *No.* 27437

People

vs.

Mobbs

Respectfully,

G. E. BISHEL
Clerk

38385-877 7-75 3M OSP

APPENDIX D

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. OTHA LEE MOBBS, Defendant and Appellant.	2d Crim. No. 27437 (Sup. Ct.No. A-607928)

THE COURT:

Upon consideration of the motion of plaintiff and respondent for stay of issuance of remittitur, which motion was filed herein on June 21, 1976, and good cause appearing therefor, it is ordered as follows:

The issuance of the remittitur herein is stayed for a period of 90 days from the date of this order to enable plaintiff and respondent to petition the Supreme Court of the United States for a writ of certiorari. In the event such petition is docketed in the Clerk's office of the Supreme Court of the United States within said period of time, then the remittitur of this court shall be stayed until the Supreme Court of the United States has passed upon said petition and notice thereof has been received by this court.